

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

**No. 25503-4-III**

**Respondent,**

**Division Three**

**v.**

**HOA VAN TRAN,**

**UNPUBLISHED OPINION**

**Appellant.**

Brown, J. — Hoa Van Tran appeals his two cocaine delivery convictions and two sentence enhancements. He contends the State failed to prove the transactions occurred within 1,000 feet of a civic center when the evidence showed the transactions occurred outside a public park. We agree. Pro se, Mr. Tran contends insufficient evidence supports his convictions. We disagree. Accordingly, we affirm and remand for sentencing corrections.

**FACTS**

While working undercover, detectives purchased crack cocaine outside a residence at 1228 Lincoln Drive in Pasco, Washington on three occasions. 1228

Lincoln Drive is across the street from Lucas Park.

The State charged Mr. Tran with three counts delivering a controlled substance. For each count, the State specially alleged that Mr. Tran committed the crime, “within a drug free zone declared by Chapter 9.38.090 of the Pasco Municipal Code as designated in a map produced or reproduced by the City Engineer for the purpose of depicting the location and the boundaries of such drug free zones, thereby subjecting himself to the enhanced penalties as provided by RCW 69.50.435 and RCW 9.94A.510.” Clerks Papers (CP) at 73.

At trial, a map created by the city engineer showing all the drug free zones in the City of Pasco was admitted into evidence. Using the map, one of the detectives testified 1228 Lincoln Drive is right across the street from a park, and the house was “well within” 1,000 feet of the park. Report of Proceedings (RP) at 41. Using the map, another detective testified the house was directly across the street from Lucas Park and was within a drug-free zone. Mr. Tran denied delivering drugs to anyone.

In closing argument, the prosecutor stated that Mr. Tran delivered the crack cocaine “well within the boundary of the drug free zone of the civic center, in fact Lucas Park here in Pasco.” RP at 133. The State’s proposed instructions, adopted and used by the court, specified Mr. Tran delivered the crack cocaine within 1,000 feet of a civic center. Instruction number 12 stated, “If you find the defendant guilty of delivering a controlled substance, it will then be your duty to determine whether or not the

defendant delivered the controlled substance to a person within one thousand feet of a civic center.” CP at 41. Instruction number 13 stated, “‘Civic center’ means a publicly owned or operated place or facility used for recreational, educational, or cultural activities designated as a drug-free zone by a local governing body.” CP at 42. Mr. Tran did not object or except to the instruction.

The jury found Mr. Tran guilty of two of the three counts. The jury found Mr. Tran delivered the crack cocaine within 1,000 feet of a civic center. Because of this finding, the trial court added a 24-month enhancement to Mr. Tran’s sentence, and sentenced him to 36 months, plus one day on each count, to run concurrently. Mr. Tran appealed.

## ANALYSIS

### A. Sentence Enhancement

The issue is whether sufficient evidence supports Mr. Tran’s two sentence enhancements. Mr. Tran correctly contends the State did not prove he delivered a controlled substance near a civic center as required by the court’s instructions.

Since no objection was made at trial to the jury instructions, the law of the case doctrine applies. Under the law of the case doctrine, “jury instructions not objected to become the law of the case.” *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The State then assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in

the instruction. *Id.* (citing *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143(1995)). A defendant may then challenge the added elements on appeal as the law of the case. *Id.* The challenge may include a challenge to the sufficiency of the evidence to prove the added element. *Id.* When reviewing whether sufficient evidence supports a sentence enhancement, we view the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201-02, 829 P.2d 1068 (1992). The evidence must show that the distance from the drug-free location to the location of the drugs was less than 1,000 feet, according to some type of accurate, objective and verifiable measuring device such as a map with a measuring scale, measuring tape, pacing, or other commonly accepted method. *State v. Clayton*, 84 Wn. App. 318, 321, 927 P.2d 258 (1996); RCW 69.50.435.

Although the State charged penalties under RCW 9.94A.510, the sentencing grid, it should have referred to RCW 9.94A.533. Under RCW 9.94A.533, a person who violates chapter 69.50 RCW, where such offense also violates RCW 69.50.435, shall have an additional 24 months added to their sentence. RCW 9.94A.533(6). The enhancement applies when a person manufacturers, sells, delivers, or possesses “with the intent to manufacture, sell, or deliver a controlled substance”:

- (1)(a) In a school;
- (b) On a school bus;
- (c) Within one thousand feet of a school bus route stop;
- (d) Within one thousand feet of the perimeter of the school grounds;
- (e) *In a public park*;

. . . .

- (i) *At a civic center designated as a drug-free zone by the local governing authority; or*
- (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter.

RCW 69.50.435(1) (emphasis added).

The City of Pasco has designated schools, public parks, housing authority, civic centers, and a 1,000 foot perimeter around each of these locations as drug-free zones within the city. Pasco Municipal Code (PMC) 9.38.090(1). The statute defines “Public park” as “land, including any facilities or improvements on the land, that is operated as a park by the state or a local government.” RCW 69.50.435(6)(d). It defines “Civic center” as “a publicly owned or publicly operated place or facility used for recreational, educational, or cultural activities.” RCW 69.50.435(6)(h).

We review statutory construction questions de novo. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The purpose of “construing a statute . . . is to determine the legislature’s intent.” *Id.* “[I]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Id.* (quoting *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). The plain meaning of a statute is derived “from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Jacobs*, 154 Wn.2d at 600.

The plain and unambiguous language of RCW 69.50.435 clearly categorizes “public parks” and “civic centers” as separate categories of drug-free zones. First, public parks are automatically drug-free zones, but civic centers must be designated as such by the local government. RCW 69.50.435(1)(e), (i). The statute provides for the designation of a drug-free zone within the 1,000 foot perimeter of civic centers, but not parks. RCW 69.50.435(1)(j). Further, the statute defines “Public parks” and “Civic centers” separate from and independent of the other. RCW 69.50.435(6)(d), (h). Further still, if we read the statute to mean public parks could also be civic centers, then the public park category, subsection (1)(e), and definition, subsection (6)(d), would be superfluous. We presume the legislature does not use superfluous words. *State v. Roggenkamp*, 153 Wn.2d 614, 624-25, 106 P.3d 196 (2005). Therefore, the legislature intended for parks and civic centers to be different categories of drug-free zones, and not for civic centers to encompass public parks.

Because the sentencing enhancement applies solely to drug-free zones created in the 1,000 foot perimeter of civic centers, and not parks, unless the State proved delivery occurred within 1,000 feet of a civic center, the trial court erroneously added the 24-month sentencing enhancement from RCW 9.94A.533(6) to Mr. Tran’s sentence.

Mr. Tran was charged with delivery in “a drug free zone declared by Chapter 9.38.090 of the Pasco Municipal Code,” but at trial, the jury was instructed that it must

find that the delivery occurred specifically within 1,000 feet of a civic center. CP at 73-74. The State incorrectly contends the official map (Exhibit 1) used at trial was enough to make a prima facie case for the sentencing enhancement. While the map does constitute prima facie evidence of the location and boundaries of the drug-free zones in Pasco, it is not prima facie evidence that the delivery occurred within 1,000 feet of a civic center. The map identifies all the schools in blue, the parks in green, and the civic centers in red. The City of Pasco has declared the areas within 1,000 feet of schools, civic centers, and parks to be drug-free zones, and the map identifies these perimeters with a black line. PMC 9.38.090(E); Exhibit 1. A large portion of East Pasco, where the delivery occurred, is circled by this black line because of the concentration of schools, civic centers, and parks.

The map shows the drug-free area located across the street from the location of the deliveries is a park, as identified by its green color. Further, the map shows the location of the delivery is not within 1,000 feet of any red civic centers. Thus, the map does not support imposition of the sentencing enhancement. The officers' testimony did not support the sentencing enhancements either, because the State's questioning focused entirely on whether the delivery occurred across the street from, or within 1,000 feet of a park.

The State did not produce any evidence that the park was a civic center within the meaning of the statute. The State's one connection came in closing argument

when the prosecutor stated Mr. Tran sold drugs within “the drug free zone of the civic center, in fact Lucas Park here in Pasco.” RP at 133. Therefore, insufficient evidence exists for a rational trier of fact to find beyond a reasonable doubt that Mr. Tran delivered cocaine within 1,000 feet of a civic center. The remedy is to reverse the sentence enhancements and remand for resentencing. *See State v. Williams*, 167 Wn.2d 889, 902, \_\_\_ P.3d \_\_\_ (2010) (specifying procedure following finding that court erred in enhancing sentence).

#### B. Evidence Sufficiency

In his statement of additional grounds for review, Mr. Tran contends insufficient evidence supports his convictions because no testimony shows how he made the transactions with the undercover police officer.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Aten*, 130 Wn.2d 640, 666-67, 927 P.2d 210 (1996). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *State v. Lubers*, 81 Wn. App. 614, 618-19, 915 P.2d 1157 (1996). Circumstantial and direct evidence are equally reliable. *Id.* at 619. We defer to the trier of fact on witness credibility and the persuasiveness of evidence. *Id.*

Under RCW 69.50.401(1), (2), the State had to prove the charge of delivery of a

controlled substance beyond a reasonable doubt. Cocaine is a controlled substance.  
RCW 69.50.206(b)(5).

Both Mr. Tran's convictions relate to events involving one detective. At trial, that detective testified he met Mr. Tran for the first time through a confidential informant when he made the first buy from Mr. Tran, and that for the second buy, he called Mr. Tran directly using the phone number Mr. Tran provided him after the first meeting. The detective testified that both times, Mr. Tran directed him to drive to the house on Lincoln Drive. According to the detective, both times Mr. Tran went into the house for a few minutes, and then handed crack cocaine to the detective once he returned to the car.

Viewing this testimony in the light most favorable to the State, sufficient evidence exists to support Mr. Tran's convictions.

Affirmed, and remanded for sentence correction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

No. 25503-4-III  
*State v. Tran*

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Kulik, C.J.

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Sweeney, J.